

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)
)
 BRANTLEY COUNTY BOARD OF)
 EDUCATION)
)
 Petition for Reconsideration of Termination of)
 License for Educational Broadband Service)
 Station WLX683)
)
 EARLE SCHOOL DISTRICT)
)
 Petition for Reconsideration of Termination of)
 License for Educational Broadband Service)
 Station WLX730)
)
 EVANS COUNTY SCHOOL SYSTEM)
)
 Petition for Reconsideration of Termination of)
 License for Educational Broadband Service)
 Station WLX698)
)
 TROUP COUNTY SCHOOLS)
)
 Petition for Reconsideration of Termination of)
 License for Educational Broadband Service)
 Station WNC417)
)

ORDER ON RECONSIDERATION

Adopted: June 15, 2009

Released: June 16, 2009

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us the above-captioned petitions for reconsideration¹ of letters² terminating the above-referenced Educational Broadband Service (EBS) licenses for failure to renew their licenses and for failure to meet their construction deadline. Sprint Nextel Corporation (Sprint Nextel) opposed three of the four Petitions.³ We also have replies filed by Brantley County Board of Education (Brantley County)⁴ and Earle School District (Earle).⁵ Evans County School System (Evans County) has also requested leave to file a supplement.⁶ For the reasons discussed below, we deny the Motion for Leave to Supplement and grant the Petitions. We also direct those Petitioners who have not yet done so to file applications for renewal of license and for extension of time to construct, together with appropriate waivers.

II. BACKGROUND

A. Extension Applications

2. Under the rules in effect prior to 2003, EBS permittees had eighteen months from the date of the issuance of the original authorization to construct their facilities.⁷ The Commission granted applications for extension of time to construct EBS stations upon a specific and detailed narrative showing that the failure to complete construction was due to causes that were beyond the permittee's control, or upon a specific and detailed showing of other sufficient justification for an extension.⁸ Applications for extension of time to construct were ordinarily required to have been filed at least 30 days prior to the construction deadline.⁹ In those cases where a station is not constructed by the deadline

¹ Letter from D. Cary Mitchell, Esq. and John A. Prendergast, Esq. to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 16, 2007) (Brantley County Petition); Petition for Reconsideration and Reinstatement and Waiver Request, Earle School District (filed Nov. 17, 2007) (Earle Petition); Petition for Reconsideration of License Termination, Evans County School System (filed Nov. 19, 2007) (Evans County Petition); Petition for Reconsideration and Reinstatement and Waiver Request, Troup County Schools (filed Nov. 13, 2007) (Troup Petition).

² Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau to Brantley County Board of Education (Oct. 19, 2007); Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau to Earle School District (Oct. 19, 2007); Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau to Evans County School System (Oct. 19, 2007); Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau to Troup County Schools (Oct. 19, 2007) (Termination Letters).

³ Opposition of Sprint Nextel Corporation (Nov. 21, 2007) (Sprint Opposition). Sprint Nextel did not oppose the Evans County Petition.

⁴ Reply of Brantley County Board of Education (filed Dec. 11, 2007) (Brantley Reply).

⁵ Reply to Opposition (filed Nov. 30, 2007) (Earle Reply).

⁶ Motion for Leave to File Supplement to Petition for Reconsideration of License Termination, Evans County School System (filed Nov. 28, 2007) (Motion for Leave to Supplement). *See also* Supplement to Petition for Reconsideration of License Termination (filed Nov. 28, 2007).

⁷ 47 C.F.R. § 73.3534(a) (2002).

⁸ 47 C.F.R. § 73.3534(c) (2002).

⁹ 47 C.F.R. § 73.3534(b) (2002).

specified in the permit or as extended by the Commission, the Commission shall declare the permit forfeited and make a notation of such forfeiture.¹⁰

3. On April 2, 2003, the Commission released a *Notice of Proposed Rule Making (NPRM)* in this proceeding, seeking comment on an industry proposal as well as other potential alternatives for restructuring the 2500-2690 MHz band.¹¹ In addition to the Coalition's proposal, the Commission also sought comment on ownership and eligibility issues, transition timetables, and additional engineering issues. In light of the fundamental rule changes proposed, the Commission suspended the construction deadline for EBS licensees "that have unexpired licenses or permits that have not expired as of [April 2, 2003] and that have made a timely filed extension request."¹²

4. Prior to March 25, 2002, the Instructional Television Fixed Service (ITFS), the predecessor-in-interest to EBS, was administered by the former Mass Media Bureau. That Bureau had a policy under which it would not accept renewal applications for ITFS stations that were not constructed.¹³ None of the stations referenced in this *Memorandum Opinion and Order* were ever constructed.

5. On March 25, 2002, the Wireless Telecommunications Bureau (WTB) became responsible for administering ITFS.¹⁴ WTB began requiring unconstructed ITFS stations to submit renewal applications. WTB did not issue a public notice announcing this change in policy. Instead, when licensees filed requests for extension of time to construct for licenses that had expired, WTB returned the applications and asked the licensees to file renewal applications with waiver requests.

6. In 2002, each of the Applicants captioned above filed an application for extension of time to construct their ITFS stations.¹⁵ Pursuant to its policy, WTB attempted to return each of the extension applications, directing the licensees to file renewal applications.¹⁶ In these cases, however, the Return

¹⁰ 47 C.F.R. § 73.3599 (2002).

¹¹ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003) (*BRS/EBS NPRM*).

¹² *BRS/EBS NPRM*, 18 FCC Rcd at 6805 ¶ 201.

¹³ See, e.g., Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division to University of Maine System, File No. BRIF-19990208AAL (MMB May 19, 2000).

¹⁴ Radio Services Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, DA 02-638 (WTB Mar. 18, 2002).

¹⁵ See Brantley Board of Education Extension Application, File No. 20020613AAD (filed Jun. 13, 2002) (Brantley Extension); Earle School District Extension Application, File No. 20020211AAH (filed Feb. 11, 2002) (Earle Extension); Evans County School System Extension Application, File No. 20020805AAG (filed Aug. 5, 2002) (Evans Extension); Troup County Schools Dismissal Letter, File No. 20020911AAD (filed Sep. 11, 2002) (Troup Extension).

¹⁶ See Notice of Return, Brantley County Board of Education, Ref. No. 3213302 (Dec. 22, 2004); Notice of Return, Earle School District, Ref. No. 3211568 (Dec. 21, 2004); Notice of Return, Evans County School System, Ref. No. 3189268 (Dec. 9, 2004); Notice of Return, Troup County Schools Ref. No. 3181825 (Dec. 6, 2004) (collectively, Return Letters).

Letters that were generated did not include return addresses. The Applicants did not respond to the Return Letters. Because there were no responses, the applications were dismissed, and Dismissal Letters were generated.¹⁷ As with the Return Letters, the Dismissal Letters did not include addresses.¹⁸ None of the Petitioners sought reconsideration or Commission review of the dismissals of their Extension Applications at that time. As a result, in 2007, WTB issued letters terminating all of the above-captioned licenses.¹⁹

7. Once the licensees received notice of termination of the licenses, each of the licensees filed Petitions for Reconsiderations along with requests for waiver of Section 1.949(a)²⁰ of the Commission's rules, which requires licensees to file their renewal applications no later than the expiration date of the license.²¹ The Applicants generally indicated that they failed to file timely renewal applications because of changes in personnel and lack of familiarity with the Commission's rules,²² or reliance upon lessees that filed for bankruptcy and went out of business.²³ Troup County Schools notes that its prior extension application was returned and dismissed with letters not having any address.²⁴

8. Sprint Nextel filed an Opposition against three of the above-captioned Petitions.²⁵ Sprint Nextel claims that the licenses at issue were terminated years ago when the licensees failed to comply with their construction obligations and any applications to renew the licenses are subject to the notice requirements in the Administrative Procedure Act and Section 309(j) of the Communications Act of 1934, as amended, the standards established for late-filed renewals applicable to EBS, and the Commission's freeze on applications for new EBS stations.

III. DISCUSSION

A. Motion for Leave to Supplement

9. We deny Evans County's Motion for Leave to Supplement. Under Section 1.106(f) of the Commission's Rules,²⁶ supplements to petitions for reconsideration are due within 30 days after public notice of the action taken. In this case, the date of public notice is October 19, 2007, the date on the Termination Letters.²⁷ Evans County did not file its Motion for Leave to File Supplement and supplement until November 28, 2007, more than 30 days after the date of public notice. Because the

¹⁷ See Notice of Dismissal, Brantley County Board of Education, Ref. No. 3368334 (Mar. 14, 2005); Notice of Dismissal, Earle School District, Ref. No. 3368335 (Mar. 14, 2005); Notice of Dismissal, Evans County School System, Ref. No. 3342677 (Feb. 28, 2005); Notice of Dismissal, Troup County Schools, Ref. No. 3342682 (Feb. 28, 2005) (collectively, Dismissal Letters).

¹⁸ *Id.*

¹⁹ See Termination Letters.

²⁰ 47 C.F.R. § 1.949(a).

²¹ See Brantley Petition; Earle Petition; Evans Petition; Troup Petition.

²² See Brantley Petition at 4; Earle Petition at 3; Evans Petition at 4-5; Troup Petition at 2.

²³ See Brantley Petition at 4; Evans Petition at 3; Troup Petition at 2.

²⁴ Troup Petition at 2.

²⁵ See Sprint Opposition.

²⁶ 47 C.F.R. § 1.106(f).

²⁷ 47 C.F.R. § 1.4(b)(5).

information contained in the Supplement was available to Evans County earlier, we do not find good cause to consider an untimely Supplement. Accordingly, we reject the Motion for Leave to File Supplement and reject the Supplement.

B. Petitions for Reconsideration

10. We conclude, based on the circumstances surrounding the return and dismissals of the Applications, that it would be inequitable and contrary to the public interest to not reinstate the licenses. As mentioned above, WTB did not issue a public notice announcing that the former Mass Media Bureau's policy of not allowing licensees to file renewal applications on unconstructed stations would no longer be followed. Rather, WTB attempted to notify the licensees that a renewal application would be required after they filed their extension applications. The Return Letters that were generated notifying them of the need to file renewal applications were not properly addressed.²⁸ We note that the issue with the Return Letters and Dismissal Letters was not due to any failure on Petitioners' part—the letters failed to print out any address whatsoever. Therefore, the Petitioners did not have adequate notice that WTB sought additional information, nor did they have adequate notice that their applications were ultimately dismissed. If the letters had been properly addressed, Petitioners would have had the opportunity to provide the requested information. We therefore grant the Petitions and reinstate the licenses.

11. We have reviewed the Sprint Opposition and conclude that it provides no basis for denying the Petitions. Sprint argues that Petitioners received and ignored the Return Letters and Dismissal Letters.²⁹ The available evidence, however, shows that the Return Letters and Dismissal Letters were never properly sent to Petitioners. Accordingly, Petitioners never had a valid opportunity to provide renewal applications as requested by WTB.

C. Applications

12. We will dismiss without prejudice manually filed applications filed in connection with the Petitions. Under our rules, renewal and extension applications must be electronically on Form 601.³⁰ By reinstating the licenses, we will allow Petitioners to file electronic renewal and extension applications in accordance with our rules. We direct petitioners to file renewal and extension applications with appropriate requests for waiver within 30 days of the release of this *Order on Reconsideration*. Failure to file such applications within the designated time period will result in a new determination that the licensee no longer has interest in the license and that the license is terminated. While it appears that good cause may exist for waiver of the rules to allow consideration of late-filed renewal and extension applications, a decision on any waiver requests filed with those applications will be made in connection with those applications, including any petitions to deny that may be filed against the renewal applications.

IV. CONCLUSION AND ORDERING CLAUSES

13. For the reasons discussed above, we grant the Petitions and reinstate the licenses in question. We dismiss the manually filed applications filed by Petitioners without prejudice and require Petitioners to refile applications electronically within 30 days of the release of this *Memorandum Opinion and Order*. While we conclude that the arguments made by Petitioners likely justify a waiver, we decline to address the waiver request at this time and instead address the waiver request during the processing of late-filed renewal and extension applications once the licenses have been reinstated.

²⁸ See Troup Petition at 2.

²⁹ Sprint Opposition at 13-14.

³⁰ 47 C.F.R. § 1.913(b).

14. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 0.331 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.106, that the petitions for reconsideration filed Troup County Schools on November 13, 2007, by Brantley County Board of Education on November 16, 2007, by Earle School District on November 17, 2007, and by Evans County School System on November 19, 2007 ARE GRANTED.

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 0.331 and 1.106(f) of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.106(f), that the Motion for Leave to File Supplement to Petition for Reconsideration of License Termination filed by Evans County School System on November 28, 2007 IS DENIED, and the Supplement to Petition for Reconsideration of License Termination filed on November 28, 2007 IS REJECTED.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 0.331 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.106, that the licenses for Educational Broadband Service Stations WLX683, WLX730, WLX698, and WNC417 ARE REINSTATED, subject to compliance with the requirement in Paragraph 18, *infra*.

17. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.934 of the Commission's Rules, 47 C.F.R. § 1.934, that the manually filed applications submitted by Brantley County Board of Education, Earle School District, Evans County School System, and Troup County Schools ARE DISMISSED WITHOUT PREJUDICE.

18. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.946 and 1.949 of the Commission's Rules, 47 C.F.R. §§ 1.946, 1.949, that within thirty days of the release of this *Order on Reconsideration*, Brantley County Board of Education, Earle School District, Evans County School System, and Troup County Schools SHALL FILE applications for renewal of license and for extension of time to construct, as appropriate, along with appropriate waiver requests, within 30 days of the release of this *Order on Reconsideration*.

19. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Blaise A. Scinto
Chief, Broadband Division
Wireless Telecommunications Bureau